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ment of a committee to nominate officers for the ensuing year will be in order.

Mr. GEORGE W. KIRCHWEY. Mr. President, I move that such a committee be appointed, consisting of five members, as provided in the Constitution.

The motion was agreed to, and the President appointed as such committee Mr. G. W. Scott, Mr. S. J. Barrows, Mr. Kirchwey, Mr. Wilson, and Mr. Lansing.

Mr. CHARLES N. GREGORY. Mr. President, I move that the Committee on Nominations be requested to report at the end of this morning's session.

Mr. ROOT. The committee will regard itself as instructed to report at the end of the morning session. Before proceeding to the discussion, I will advise members of the Society that the President of the United States will receive members at the White House at half-past two o'clock precisely, and that for the purpose of identification members should provide themselves with cards, which can be obtained in the little red room at the side of the F street entrance of the hotel, just at the top of the stairs.

If there is no other business, we will proceed with the discussion upon the topic "Should the violation of treaties be made a Federal offense?" The Chair will recognize Hon. George Turner.

ADDRESS OF MR. GEORGE TURNER,
OF SPOKANE, WASHINGTON.

Mr. President, and Ladies and Gentlemen: The right and power of the Federal Government to make violations of its treaties by its own citizens penal offenses has never been made the subject of determination by the courts, so far as I am informed. I do not know that the power has ever been questioned, but the fact that it has never been exercised, and that there is a dearth of judicial authority on the subject, makes it proper to state with some fullness the grounds upon which it is believed the power can be sustained.

The Government of the United States is a Federal Government, and, for domestic purposes, the subjects of sovereignty are divided

between it and the States of which it is composed; but for all international purposes, as well as for the domestic purposes coming within the purview of its powers, it is a nation in the largest sense of the term — possessing all the powers of any other nation. This statement must be qualified by the admission that its powers are limited by its written Constitution, and that that instrument curtails to some extent the scope of its treaty-making power and the method of the enforcement of treaties on its own citizens, but those limitations are known to the publicists of other nations, and therefore enter into every international agreement we make and constitute limitations on their scope of which other nations have no right to complain. The same thing may be said of every constitutional government, and it is not in any true sense an impeachment of their power as nations. All barbarous and semi-civilized governments are absolute in the power to submit the lives and property of their subjects, the integrity of their political subdivisions, and the exercise by them of local municipal administration, to the exigencies of treaty stipulation; but this power is an evidence of weakness rather than of strength in their international standing, and subjects them to exactions from which other and more advanced nations are exempt. It is, perhaps, more accurate to say that the Government of the United States, within the constitutional limits which bind it, for all the purposes of the law of nations, so far as that law defines the rights and obligations of nations, and for all the purposes of entering into treaty engagements and of performing them and of requiring their performance by others, is a nation in the largest sense of the term, possessing all the powers of any other nation. For these purposes it admits no divided sovereignty with any other state, foreign or domestic, and its powers, for the purposes stated, are equally broad and unlimited, whether exerted externally and beyond its borders, or internally and within the limits of its own territory. The performance by such a nation of its international duties, which includes the duty of compelling its own citizens to respect and observe the engagements it has made in favor of foreign nations, is one of its most important functions, essential alike to its self-respect, its sense of justice, and its standing among other nations. To deny it the power

to perform that duty by any means appropriate to the end would be to paralyze and ultimately to destroy it. Duty and want of power to comply with its requirements are, in a governmental sense, incompatible and utterly repugnant ideas.

It requires to take but one step further in the demonstration, and that is to inquire whether the lending by a government of penal sanction to its international engagements, so far as those engagements operate on and require for their observance the obedience of its citizens, is an appropriate means to the end sought — that is to say, would it secure or tend to secure for such engagements their due observance? It is sufficient to say in disposing of that inquiry that a negative answer would require the abrogation of all penal laws.

Since, then, the power to enforce respect for its treaties resides in every nation and must reside in ours, and the enactment of penal laws is an appropriate means to that end, it necessarily follows from the nature of the power and the nature of our Government that the power resides in the National Government to make violations of its treaties Federal offenses. An examination of the Constitution for the purpose of finding if there be any limitation on the power discloses that there is none. On the contrary, there appears to be express warrant in the Constitution for the exercise of the power. Article VI of that instrument declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Section VIII, Article I, declares that "The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Section II, Article III, declares that "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," etc. The jurisdiction declared

by the last section referred to does not attach *ipso facto*, but it is the measure or limit within which Congress must confine itself in the creation of rights and duties enforceable by Federal judicial procedure. It may be taken, also, as a declaration of the power of Congress to legislate within the limits declared. The section creates a vast reservoir of Federal judicial power, beyond the limits of which Congress can not go, but within which limits it may carve out and assign to any Federal tribunal the fullest measure of supreme and unlimited jurisdiction. If, then, a criminal prosecution for the breach of a treaty, to which breach Congress had attached a penalty, would be a case arising under that treaty, express constitutional authority in Congress to attach such penalty and make the case cognizable in one of the Federal courts would seem to be made out. I maintain that such a prosecution would be a case arising under the treaty. The treaty without any penalty attached to it is a part of the law of the land, binding on all persons. The attaching a penalty to its breach does not make the treaty any more the law. The courts in adjudicating its breach would look at the treaty, construe its meaning and define the same, and would look at the law only for the purpose of finding the penalty. It is the treaty which measures the duty of the citizen, and it is the violation of the treaty which brings the penalty into play. As well say that civil causes, in which treaty rights are brought into question, arise under the statute giving the courts power to adjudicate such rights instead of under the treaty, as to say that a prosecution for a criminal breach of a treaty arose under the statute giving the court jurisdiction of the crime instead of under the treaty which had been broken. We are not without express authority on this point. In a habeas corpus case, where the prisoner was held under extradition proceedings, appealed to the Supreme Court of the United States, the contention was made that the case only involved a construction of the acts of Congress on the subject of extradition, and hence that there was no jurisdiction in the court on appeal. The Supreme Court, in disposing of that contention, say:

We do not concur in this view. The treaties of 1842 and 1889 are the basis of this litigation, and no effective decision can be made of

the controlling questions arising upon the appeal without an examination of those treaties and a determination of the meaning and scope of some of their provisions. A case may be brought directly from a circuit court to this court if the construction of a treaty is therein drawn in question. (26 Stat. 826, ch. 517, sec. 5.) The petition for the writ of habeas corpus and the warrant under which the accused was arrested both refer to the treaty of 1842, and the court below, properly we think, proceeded on the ground that the determination of the questions involved in the case depended in part, at least, on the meaning of certain provisions of the treaty. The construction of the treaties was none the less drawn in question because it became necessary or appropriate for the court below also to construe the Act of Congress passed to carry their provisions into effect. — *Pettit v. Walsh*, 194 U. S., 205.

A somewhat analogous case arose in the history of the Government under the Articles of Confederation. The capital was then at Philadelphia, and causes of national cognizance were heard and determined by the Supreme Court of Pennsylvania. A French citizen, aggrieved at the refusal of the secretary of the French legation to certify his former status as an officer in the French army, invaded the residence of the French minister, used threatening and opprobrious language toward the secretary, and subsequently, meeting him on the street, assaulted him. The Supreme Court of Pennsylvania held that the offense was one against the law of nations, which it held was a part of the laws of Pennsylvania, and inflicted as a penalty punishment conformable to that provided by the local municipal law for similar offenses. (*Respublica v. De Longchamps*, 1 Dallas, 111.)

The fact that Congress has never seen fit to assert its power to attach penalties to the violation of treaties leaves us without express judicial determination on the subject, but there are a multitude of decisions by the highest courts in the land, including the Supreme Court of the United States, which, by the clearest analogy, would sustain the exercise of the power. Among those cases are *Ex parte Siebold*, 100 U. S., 389; *Ex parte Nagle*, 135 U. S., 60; *Logan v. United States*, 144 U. S., 263; *In re Debs*, 158 U. S., 579. I do not quote from these cases and apply them, because of the necessary limits of this paper, but will say that it is impossible to read them without reaching the conclusion that they are fully and fairly deter-

minative of the question under discussion. The great men of the nation, however, who have filled the Executive chair, and their constitutional advisers, have had the specific question brought to their attention, and they have on more than one occasion spoken in no uncertain tones. President Harrison, in his annual message to Congress of December 9, 1891, after discussing the lynching of a number of Italians at New Orleans, which had given rise to diplomatic complications with Italy, spoke as follows:

Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers.

President McKinley, in his annual message to Congress of December 5, 1899, moved by the lynching by a mob of five more Italians in Louisiana (this time at Tallulah), repeated the suggestion of President Harrison concerning congressional legislation and urged action upon it. He said:

The recurrence of these distressing manifestations of blind mob fury directed at dependents or natives of a foreign country suggests that the contingency has arisen for action by Congress in the direction of conferring upon the Federal courts jurisdiction in this class of international cases, where the ultimate responsibility of the Federal Government may be involved. The suggestion is not new. In his annual message of December 9, 1891, my predecessor, President Harrison, said: "It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal courts."

After quoting from a bill covering the subject, introduced in the Senate in 1892, but not acted on, President McKinley continues:

I earnestly recommend that the subject be taken up anew and acted upon during the present session. The necessity for some such provisions abundantly appears. Precedent for constituting a Federal jurisdiction in criminal cases where aliens are sufferers is rationally deducible from the existing statute which gives to the district

and circuit courts of the United States jurisdiction of civil suits brought by aliens where the amount involved exceeds a certain sum. If such jealous solicitude be shown for alien rights in cases of merely civil and pecuniary import, how much greater should be the public duty to take cognizance of matters affecting the life and the rights of aliens under the settled principles of international law no less than under treaty stipulations in cases of such transcendent wrong-doing as mob murder, especially when experience has shown that local justice is too often helpless to punish the offenders.

In his next annual message (that of December 3, 1900) President McKinley renewed his previous recommendation and reinforced it with additional observations, saying:

It is incumbent on us to remedy the statutory omission which has led, and may again lead, to such untoward results. I have pointed out the necessity and the precedent for legislation of this character. Its enactment is a simple measure of previsory justice toward the nations with which we as a sovereign equal make treaties requiring reciprocal observance.

Machinery for the protection of the civil rights of aliens, including their restoration to liberty when unlawfully detained in prison, much more elaborate than that indicated in the message of President McKinley, has been provided by the legislation of Congress. The appellate jurisdiction of the Supreme Court in cases brought from the highest courts of the States has always, since the judiciary act of 1789, extended to cases where a treaty having been drawn in question, the decision has been against the validity of the treaty or of a right of title claimed under it. The jurisdiction of the circuit and district courts has always since the same period extended to cases in which aliens were parties, and since the acts of March 3, 1887, and August 13, 1888, the circuit courts have had jurisdiction of all civil suits at law or in equity where the matter in dispute exceeds in value the sum of two thousand dollars, arising under the Constitution or laws of the United States or of treaties made or which shall be made under their authority, * * * or of controversies where a like amount is in dispute, between citizens of a State and foreign states, citizens, or subjects. By section 753 of the Revised Statutes of the United States all the courts of the United States may issue writs of

habeas corpus to release prisoners in custody under color of State laws in violation of the Constitution or of a law or treaty of the United States. The Federal power is thus asserted for the protection of the civil rights and the personal liberty of foreigners, where the same are secured by treaty, in every forum in the country, State or national.

Congress has in a number of cases provided penalties to secure the observance of our international obligations where the latter grow out of the principles of international law. Among such statutes are those enforcing by penalties the duty of neutrality in case of war between foreign nations, and still other statutes assuring by penalties the inviolability of the persons of foreign ministers, their property, and that of their household. The right to enact such legislation proceeds and can proceed on no other or higher authority than that which would sanction penal legislation in aid of treaties. Since the nation has gone so far, it would seem to be rationally deducible therefrom, as suggested by President McKinley, that it has the power to take the one step further necessary to put behind every treaty the force and power and majesty of the National Government.

I now go a step further, and assert that it is the duty of the National Government toward foreign governments to place under the sanction of its penal laws the observance by its citizens of its treaty stipulations. A nation having concluded a treaty with another nation should not only require its observance by that nation, but should be in a position, so far as human prevision allows, to honorably fulfill and execute the treaty on its part. But the execution of treaties in all their provisions is not a matter which can be controlled in every case by the executive of the nation, however willing and anxious he may be to satisfy national obligations. Many treaties have provisions which call for the obedience of the citizen and require his cooperation in their observance. The most common of these provisions and the one most often giving rise to international disputes (and the only one, I imagine, needing penal sanction) is that one, found in most general treaties, extending the right of peaceable domicile to aliens, and assuring to them protection in life and property.

How far the nation is responsible for violation by its citizens of this provision is an open question. In our diplomatic history we have generally insisted on both indemnity and punishment where our citizens have been molested in foreign countries, but have denied our own liability where foreigners have been injured or killed by our own citizens in this country. But there appears to be an unanimity of expression to the effect that connivance by the authorities in the commission of the outrage or failure to take steps to prevent it where possible, and negligence or indifference in bringing the guilty persons to punishment, are features in such cases which fix on the nation liability to make reparation. Cases have not been wanting in this country where the local State authorities have connived at the commission of mob violence against foreigners involving the loss of life and destruction of property, or in which they have failed to take proper steps to prevent the same, and in many cases there has been negligence and indifference in bringing the guilty parties to justice. In the language of President McKinley, "local justice is too often helpless to punish the offenders." In the words of President Harrison, "the Federal officers and courts have no power in such cases to intervene, either for the protection of a foreign citizen, or for the punishment of his slayers." The want of power here spoken of by President Harrison was that arising from the failure of Congress to act and not a want of inherent power in the National Government. The want of power both to protect against outrage and to punish for it when protection has failed must continue until Congress does act in the exercise of its jurisdiction, because neither the marshal with a *posse comitatus* nor the President with the army behind him can intervene of his own motion merely to preserve the peace of the several States; and until Congress acts, that is the only peace that is broken by the commission of outrages on the persons and property of aliens.

In the face, then, of this want of power of the Federal officers and courts to act for the prevention of outrages against the treaty rights of aliens, and of this local justice to which we remit them, "too often helpless to punish the offenders," how can we defend ourselves against the complaints of foreign governments so long as the

National Government, having the right to arm its own officers with power to prevent and its own courts with power to punish outrages on the treaty rights of foreigners, fails, by appropriate legislation, to exercise that right? Is not its failure to so arm its officers and courts a failure to take essential steps for the prevention of outrages, and negligence and indifference in bringing the guilty to punishment, which effectually fixes its liability in every failure of justice under the local law? We certainly ought not to guarantee protection to aliens in our national capacity, and then, having the means to protect them ourselves, turn them over to a jurisdiction often confessedly impotent, and in all cases beyond our power to influence or control. Whatever may be said of our liability by reason of the nonexercise of the Federal power, a failure to exercise that power is not good faith and fair dealing with foreign nations.

Of the many cases in our history where demands have been made on us for indemnity for failure to protect foreigners in their treaty rights, all which were of gravity and importance and were pressed with vigor were settled by the payment of indemnity, but always with a reservation that the payment was made *ex gratia*, and should not create a precedent; but payments have been made so often that it is doubtful if they do not create precedents, notwithstanding the reservations. Behind such payments, made so often, there must have been a recognition of the inherent weakness of the position of the Government. How could it be otherwise when so great a constitutional and international lawyer as Secretary Evarts, in the case of the riots against the Chinese at Denver, was compelled to account for the failure to suppress the rioters and protect the Chinese by urging that "under the limitations of that instrument [the Constitution] the Government of the Federal Union can not interfere in regard to the administration or execution of the municipal laws of a State of the Union, except under circumstances expressly provided for in the Constitution," and in the same communication was compelled to excuse the failure of the United States to interfere with the processes of punitive justice by saying: "It will thus be perceived that so far as the arrest and punishment of the guilty parties may be concerned, it is a matter which, in the present aspect of the case,

belongs to the government and authorities of the State of Colorado." As a question of inherent power in the Federal Government, which was the standpoint from which Mr. Evarts was discussing the matter, the positions taken by him were misleading, if not distinctly and radically wrong. There will be fewer miscarriages of justice, less indemnity to be paid, and greater composure in the minds of our diplomatic representatives if the Government in the future shall give its own courts cognizance of such crimes and arm its own officials with the legal power to prevent them.

Undoubtedly, the exertion of the power by the Federal Government will bring about some confusion in the exercise of the respective jurisdictions of the Federal and State governments in the punishment of crime, and may, in its inception, produce some friction, but this is inseparable from every new assertion of Federal power, and ought not, where the power is certain and the necessity for its exercise imperative, to stand in the way. Moreover, legislation could be drawn in such a manner as to minimize conflicts of jurisdictions and do away with any just cause of dissatisfaction. Of course, criminals and evilly disposed persons and their sympathizers will never be satisfied with any law.

The bill introduced in the Senate of the United States in 1892 and referred to by President McKinley in his message of December 5, 1899, was described by him thus:

The bill so introduced and reported provided that any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, and constituting a crime under the laws of the State or Territory, shall constitute a like crime against the United States and be cognizable in the Federal courts.

In a bill so generally drawn it would be difficult to affix penalties for the several offenses which might come within its provisions, and I presume the State penalties were adopted along with the State crimes which the bill adopted. There is grave doubt whether such a measure, if adopted by Congress, would be valid. Congress can not delegate its constitutional power to legislate to the several State

legislatures. It must itself denounce those things which it purposes shall constitute crimes, and must itself determine the penalties to be affixed to them. Under the operation of the Senate bill before referred to a particular act might be an offense in one State and not in another; it might be subject to different penalties in different States, and these matters would be changing all the time with the varying legislation of the States. A State might (though that is an extreme case and hardly to be supposed) defeat conviction in a Federal court after the commission of the crime by repealing the criminal statute. The plan of the bill seems objectionable from every point of view. The acts of violence and aggression which may be committed against the treaty rights of foreigners, and which it would be desirable to punish in the Federal courts, are few in number and easily classified. They would be embraced under the head of murder in its various degrees, assault with intent to commit murder, aggravated assault, malicious destruction of property, and possibly laws against unlawful and riotous assemblies with intent to commit any of the offenses enumerated. A bill denouncing these several crimes, describing them with technical accuracy, when committed against any person a citizen or subject of a foreign country, in violation of a right secured to such citizen or subject by treaty between the United States and such foreign country, and affixing a proper penalty in each case, would be invulnerable to attack, and should, I think, be the form of legislation adopted. If, for any reason, this method of proceeding should be considered objectionable, the form of statute employed for crimes against the elective franchise and civil rights of citizens, found in chapter 7, title "Crimes," Revised Statutes of the United States, might be employed, and would no doubt be effective for all practical purposes. Section 5508, found in that chapter, denounces the crime of conspiracy to injure, oppress, threaten, or intimidate any citizen in the exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, and affixes a severe penalty to the commission of the crime. Section 5509 provides that if in the act of violating the preceding section any other felony or misdemeanor be committed the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed. This last section is subject to the

objections made to the Senate bill referred to by President McKinley in his annual message to Congress. It has never passed the scrutiny of the Supreme Court of the United States, and the wisdom of employing it in Federal legislation is doubtful. It might be adapted, however, to constitutional requirements. It would not be objectionable to identify and define the offenses to be proceeded against under the Federal law, by reference to the local law in force at the time of the commission of the offense, selecting those common and general in all the States and Territories and most necessary to be guarded against, as murder in its several degrees, manslaughter, and the several forms of aggravated assault. But the adopted offenses should each have its appropriate penalty specifically provided by the Federal law. Minor offenses would be left to the exclusive jurisdiction of the State tribunals, and even those of a major character, when not growing out of race prejudice or committed by mob violence, and therefore not likely to go unpunished by the local law, could be left to take their course in the State courts. The authorities seem to establish that the same act may constitute an offense both against the law of the State and against the law of the nation, and that proceedings had in the one jurisdiction under its peculiar law constitute no bar to proceedings in the other.¹

The jurisdiction first attaching in such cases would, no doubt, inhere to the end, but when the end had come, if it had proven barren of results, the other jurisdiction could be invoked and a result sought more in keeping with the demands of justice. With such legislation we would have an efficacious system, not burdensome to the Federal courts, under which the National Government could meet all its treaty obligations — acknowledging its fault when in fault and making reparation, and standing on its own record, made by its own officers and its own courts, when it felt that it had honorably met all international requirements.

¹ U. S. v. Marigold, 9 Howard, 565; Fox v. Ohio, 5 Howard, 410; Moore v. People, 14 Howard, 17; United States v. Barnhart, 22 Fed. Rep., 285; *Ex parte* Siebold, 100 U. S., 389; Cross v. North Carolina, 132 U. S., 389; Campbell v. United States, 4 Fed. Cases, 1203; United States v. Avery, 24 Fed. Cases, 811; United States v. Givens, 25 Fed. Cases, 1331; United States v. Wells, 28 Fed. Cases, 523.

STATUTES SUGGESTED BY MR. TURNER RELATIVE TO PROTECTION OF ALIENS

I.

SECTION. 1. If two or more persons conspire to injure, oppress, threaten, or intimidate any person, a citizen or subject of a foreign country at peace with the United States, with which country the United States shall have a subsisting treaty, in the free exercise or enjoyment of any right or privilege secured to him by such treaty, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, a citizen or subject of a foreign country at peace with the United States, to prevent or hinder his free exercise or enjoyment of any right or privilege so secured to him, they shall be fined not more than five thousand dollars and be imprisoned not more than ten years.

SEC. 2. If in the act of violating any provision of the preceding section any person, a citizen or subject of a foreign country at peace with the United States, with which country the United States shall have subsisting a treaty stipulating for protection to the life and person of citizens or subjects of such foreign country, shall be killed, or injured in his person, under circumstances which would make the offender guilty of murder in any of its degrees, or of manslaughter, or of assault with intent to kill, assault with intent to murder, assault with a deadly weapon, or of aggravated assault, under the existing laws of the State or Territory where the offense is committed, then the offender shall be guilty of like offenses under the laws of the United States and shall be punished for the same as follows:

For the crime of murder in the first degree the offender shall suffer death.

For the crime of murder in any lesser degree, or of manslaughter, the offender shall be punished by imprisonment in the penitentiary for not less than five nor more than twenty years at the discretion of the jury.

For the crime of assault with intent to kill, assault with intent to murder, assault with a deadly weapon, and of aggravated assault, the offender shall be punished by a fine of not more than five thousand dollars or by imprisonment in the penitentiary not to exceed five years, one or both, at the discretion of the court.

II.

Every person who shall, within any State or Territory of the United States, purposely and of deliberate and premeditated malice kill another, a citizen or subject of a foreign country at peace with the United States, with which country the United States shall have subsisting a treaty stipulating for the protection and security to the life and person of citizens or subjects of such foreign country while lawfully in the United States, shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death.

Mr. GEORGE GRAY, of Wilmington, Delaware. Mr. President: Nothing but the importance of this topic would impel me to ask a question of the gentleman who has so ably discussed it. I think we all recognize its importance.

The proposition, as I understand it, is that the Federal Govern-

ment should take upon itself the enforcement of certain rights supposed to belong to aliens in the States where they are resident, by virtue of treaties between this Government and the countries from which such aliens have come. Such a proposition should receive careful consideration. I therefore would like to ask Senator Turner, to whom I have listened with great interest, whether he understands that the scheme which he is discussing and approving involves legislation on the part of the Federal Government that shall turn over to Federal courts the jurisdiction of all offenses or crimes against the person, property, or safety of aliens from countries with whom we have treaties guaranteeing in general terms like treatment of their subjects and citizens with the citizens of our own country? Does he think that such a treaty obligation as I have indicated makes it necessary or proper to turn over to Federal courts the administration of the criminal jurisdiction as heretofore existing in the States, wherever it may concern offenses committed against the person or property of such aliens who have been incorporated into the mass of the population of the several States, and who constitute a part, so to speak, of the community thereof?

Mr. GEORGE TURNER, of Spokane, Wash. Mr. President: I suggested in the paper just read two alternative forms of legislation, and indicated very briefly one of the alternatives in mind, namely, the passage of a statute denouncing the crime of murder for the killing of any foreigner lawfully in this country with whose government the United States has subsisting a treaty guaranteeing to it the security of the lives and persons of its citizens, and denouncing as crimes lesser forms of violence on the persons of such foreigners. This, of course, would necessarily involve an assertion of Federal jurisdiction in every case where, by mob violence or otherwise, a foreigner had been killed or injured in such manner as to bring the statute into play. But I suggested further (and the suggestion to some extent meets the objection of Judge Gray) that while the Federal Government might put such a law on the statute books, the law itself would not supersede that of the States for the punishment of the same character of crimes, nor would the commencement of

proceedings under it oust the jurisdiction of the State courts if the State courts were the first to obtain jurisdiction. The same act would constitute a crime both against the State and the nation, and the jurisdiction first attaching, by virtue of the possession of the offender and the institution of proceedings for his punishment, would inhere to the end. I do not think any very great conflict between the States and the nation would ensue by reason of such legislation. There are already a number of crimes as to which there is concurrent jurisdiction in the State and national tribunals, and that situation has not thus far occasioned serious complications.

MR. GEORGE GRAY. Mr. President: The Senator has made a very interesting argument, in asserting the power of Congress to enact such legislation. As to the expediency, however, of such legislation, I desire to say that the proposition seems to me to ignore the genius of our dual form of government, and the sovereign character of the States, in all that concerns their criminal jurisdiction. Nothing seems to me more vitally important to our constitutional scheme than the preservation, in their integrity, of the police powers reserved to the States. Any impairment of, or encroachment upon, those powers detracts by so much from State sovereignty, and measurably weakens the foundations of local self-government, upon which our institutions largely rest. In the practical workings of the Federal and State governments during all our past history, there has been an assumption not only of the plenary authority, but of the plenary competency of the State governments, by the enactment and administration of their own criminal laws and the exercise of their police powers to maintain peace and good order within their borders, and to wholesomely regulate all matters concerning the health, comfort, and well being of the people thereof. It would be a disturbing factor, and would unnecessarily impair the respect in which the criminal jurisprudence of a State is and ought to be held, to introduce a discrimination between aliens and citizens in the administration of the State's criminal laws and its police authority. The States themselves can not make — indeed, they are inhibited by constitutional restraints from making — such discrimination, and the whole body of their criminal and police jurisprudence is applicable to all residents alike.

Why, then, should we single out from the mass of the population now equally amenable to these laws aliens as a favored class, and withdraw them from the control of State laws, to which all citizens and residents are alike subject? To do so seems to me to be an imputation upon the integrity of the State autonomy and upon the reputation and character of a State judiciary, and the competency of the people of the several States for local self-government. It tends to degrade the States and their judicatories in the eyes of the world, and to fix upon them, in our dealings with other countries, a status of provincial subordination unknown to our constitutional scheme of government, and abhorrent to the genius of our institutions.

The legislation thus proposed has no analogy to those criminal statutes of the United States which define and punish violations of its own laws, and which are necessary to maintain in their full vigor the delegated powers of the General Government. Though discussing only the expediency, and not the constitutionality, of such legislation, I may be permitted to observe that I have always believed that, large and ample as the treaty-making power conferred by the Constitution upon the President and the Senate undoubtedly is, it must be construed with reference to our general form of government, and be subordinated to its requirements. I venture to assert that a treaty which, either directly or by the implication of any of its stipulations, ignores the existence of the States, which in their union form this nation, is beyond the power of this Government to make.

Why should the Federal Government, in the exercise of its treaty-making power, undertake to give to aliens resident in the several States of this Union any other rights than those possessed by the citizens of those States, with respect to the administration of their criminal laws?

Notwithstanding those lamentable instances in which mobs have threatened the lives and safety of aliens—notably on our western coast, where individuals of the Asiatic race have been subjected to attack—I think we can say that our States have been as jealous in their administration of their criminal laws for the protection of all

classes of citizens and residents as Federal courts are likely to be. Judges, whether Federal or State, are selected from the same community, and the juries would be drawn from the same vicinage, whether the trial was in a State court or a Federal court. The Executive Federal Government could no more interfere with the orderly procedure of one court than with the other. If mob violence can not be suppressed by the State executive, he may call upon the Federal Executive to exercise the national power in his aid. I always think that the proper attitude was taken by the Premier of England on a notable occasion, when an Austrian statesman, unpopular for some reason on account of his public conduct at home, was mobbed in London. When redress was asked for by his home Government, the reply was made that the redress must be sought in the ordinary courts of the country to which all British subjects and all residents of the Kingdom were alike amenable.

I believe that when this Government, in the exercise of its treaty-making power, guarantees the citizens or subjects of a foreign country equal rights and equal protection with our own citizens, they mean that the existing courts, State and Federal, are open alike to all, and that when the "courts of our country" are spoken of in diplomatic intercourse the State courts, in their proper spheres, as well as the Federal courts, are included in that phrase. The State courts are the "courts of our country" in every sense of that word, and the Federal Government, constituted and supported by the States, may well be looked to to guarantee the integrity and impartiality of the State courts as well as of the Federal courts.

Let us go slowly, then, in disturbing the existing situation.

Now one word more. This seems to have been the sense of the Congress of the United States on two different occasions — in 1892 and in 1899, I think it was — when certain legislation was urged upon Congress by two such Presidents as Harrison and McKinley, men who are respected throughout the country, without regard to partisan politics, for their high character and eminent services. Congress did not see fit, after debate and discussion, to act upon these suggestions, not denying perhaps the necessity of some legislation, but not willing to go so far as was suggested by the honorable gentleman who has just taken his seat.

Mr. Root. Mr. Sherley, who has been present during the delivery of the paper that has been so admirably presented, is in attendance at the meeting, and as he has presently to attend the session of the House, before calling upon the next paper upon this subject, to be read by Mr. Lansing, I will ask that Mr. Sherley speak on the subject, and as I have also to meet a Government appointment, I will ask Mr. Foster to take the chair, and I will meet the members of the Association at half-past two o'clock.

Mr. SHERLEY, of Louisville, Ky. Mr. President and Gentlemen: The question suggested by Judge Gray, as to the advisability of doing what has been shown by the first speaker as within the power of Congress to do, raises a very interesting subject, and I shall allude to that briefly, and then tell you of the present status of the proposed legislation inaugurated by myself in a previous Congress and again in this Congress.

I have been noted rather as a stickler for States' rights and come from a country where the doctrine is more or less popular, but I believe there is one fundamental answer to the proposition suggested by Judge Gray, and that can be put into the form of a sentence — that where there is responsibility there there ought to be power. Now, whenever there is any trouble growing out of injuries to aliens resident in America, no foreign country looks to the State or locality where that injury has occurred, but it naturally looks to the nation that has guaranteed certain rights to that alien, and to my mind it is not a proper answer for the United States to say that we have the power to give rights but no power to enforce their observance. I do not believe that it will be necessary to enter into any detailed plan for giving the Federal courts jurisdiction of every minor offense that might arise as against an alien; it can very simply be done so as to cover those important cases which would be the subject of international concern.

In the case of *Baldwin v. Frank*, the question of the power of the United States was clearly indicated. It can hardly be said to have been adjudicated, but almost so, because it was a necessary predicate, you might say, to what was further said and decided by

the court. That case grew out of an indictment of certain Californians who had conspired against a Chinese subject, resident in California, during a time of excitement in that State, due to the feeling against the Chinese. The men were indicted under sections 5519 and 5508 of the Revised Statutes, as I now recall. The case went to the Supreme Court of the United States, and the Supreme Court held that section 5519 was unconstitutional, following the Harris case, and then, though holding that section 5508 was constitutional—it having been repeatedly so determined—decided that by its terms it did not embrace the case of an alien, because, as the lawyers here present will recall, that section provides that if two or more persons injure, oppress, threaten, or intimidate any citizen in the free enjoyment or exercise of any right guaranteed under the Constitution or laws of the United States, they shall be punished, etc.

The Supreme Court held that the word "citizen" was used in a narrow sense and applied to citizens only and not to aliens, and that therefore the section was not applicable, but the court held and stated clearly that the power of Congress to legislate making an offense against aliens punishable was clear and beyond doubt. So that three years ago I introduced in the House a bill which changed section 5508 simply by striking out the word "citizen" and inserting the word "persons." The theory—and it somewhat reaches the proposition advanced by Judge Gray—was that it was a conspiracy section and would deal only with those offenses that arose to the dignity of a conspiracy, and that an attack on an alien by an individual, while it might be very grave in its consequences, hardly presented a condition of affairs where it would be necessary for the Federal Government to take jurisdiction. I do assume, however, that there can be a condition of affairs in a State when sentiment is such that by virtue of mob spirit and mob action many acts can be committed of great magnitude, and that such acts ought to be within the cognizance of a Federal court and punished by a Federal court, when there is a violation of the rights of aliens.

So that this bill was introduced in that form. It also avoided another difficulty. There has been and will continue to be, for a

great many years, difference of opinion as to what rights can be conferred upon aliens by the Federal Government. Those who belong to the strict school of construction, like myself, are not willing to concede that the rights that are frequently claimed can be created by treaty can be given; we are not willing to concede that some of the rights claimed in the recent cases that arose in California could be given, and so I did not deem it wise to bring that question into the consideration of this matter in Congress, and provided simply that the violation by conspiracy of a right should be punished, leaving it to the courts to determine, as they must determine in the final analysis, what rights can be given, and when they have been violated.

Now, there is but one objection in my mind to such a statute, and that objection will apply equally well to section 5508 — this old civil rights statute; for it was one of the original sections of the civil rights act — and that is that a criminal law should be specific and definite, but under the constructions that have taken place relative to section 5508, and the form of a sufficient indictment, no harm can come to the individual under such a section, and it gives you a law elastic and sufficient to meet the cases as they occur.

There were two suggestions made by Senator Turner that I believe have been passed upon, and contrary to the view he presented, and it may be interesting to notice them. Congress has undertaken several times to make the laws of a State Federal laws, and such power has been upheld, the Supreme Court holding that such action by Congress adopted the law of the State at the time the Federal act was passed, so that if there was a subsequent change of the State law — even a repeal of the State law — it did not change the Federal law. Section 5509, which is an addendum, so to speak, of section 5508, has been upheld by the Supreme Court of the United States in several cases. That section provides that if in the carrying out of the conspiracy mentioned in section 5508 any offense shall be committed which is punishable by the State law, a similar punishment shall apply to those engaged in the conspiracy.

Now, in conclusion, it may interest you to know that my bill was referred to the Department of State and received its very cordial indorsement, and has recently been reported, with a slight amend-

ment, by a unanimous vote of the Judiciary Committee of the House. The amendment substitutes the word "alien" for "person" and confines the statute to injuries to rights given by treaty instead of using the words "Constitution or laws of the United States." The change is practically one of form and met with my approval. The bill is now on the calendar, and while it is too late at this session to hope for legislation by the House, I have reason to hope that before the Sixtieth Congress dies the House will pass the bill, although there is urged by some members the objection that has been voiced by the distinguished Judge [Justice Gray], that it would give to the Federal Government control over matters that ought to remain with the States. The answer, I repeat, must be that "where there is responsibility there there ought to be power."

Mr. GEORGE GRAY. Mr. President: I only want to say to the gentleman who has given us the comfortable assurance that the legislation now proposed in Congress will be upon such safe and well-guarded lines as he has indicated, that I am making now no objection on the score of power, but I think that the Federal Government is responsible to all the world for our form of government. It is in a certain sense responsible to the State governments, to represent them and their citizens in all that concerns foreign relations. The States have no other form of representation in this respect, and I think we should be content that the Federal Government should be so far sponsor for the States as to pay indemnity for their failure (if it is asserted and proved) to properly vindicate the rights of those residents who happen to be aliens.

Mr. SWAGAR SHERLEY. If the Judge will permit a question in return: When the Federal Government is arraigned by a foreign government for its failure to protect an alien to whom a right has been given, not by a State but by the National Government, and where there has been not only no protection but no punishment of the wrongdoer — what answer could the United States Government give? Shall it simply plead that, under our dual form of government, we must leave to the States, not those things which belong to the States, but the upholding of rights created, not by any State, but by Federal action?

Mr. GRAY. The question involves a good deal. I am not willing to admit that such rights, as the gentleman supposes, can be created by treaty. Certain obligations may be imposed by treaty upon all persons within our borders, to refrain from certain acts injurious or unfriendly to a treaty power, and we have legislation on our statute books to punish such acts, and Federal courts are invested with jurisdiction therefor; for example, our neutrality acts and acts to prevent filibustering. But these are very different from the legislation proposed. It depends upon the character of the right sought to be enforced. I do not think the Federal Government is derelict in its duty to any foreign country when it says, in effect, that the great mass of police powers are committed to the State sovereignties, and in this respect it represents them. Lord Palmerston said to Austria: "Your subjects must go to the courts where all Englishmen go." We say: "You must go to the courts where all Americans go" for the ordinary protection given by the police power.

Mr. SHERLEY. It does not take exclusive jurisdiction; it takes a jurisdiction only in the same way that it would take it as to an American. If an American has a Federal right and the State court does not enforce his right, the Federal court enforces it. For instance, if a negro is deprived of a right, on account of his race or color, under this very section 5508 the Federal court enforces that right.

Mr. GRAY. That is a very apt illustration. But how could you embody in an indictment the allegation that an alien was deprived of a right, *qua* alien, or that the assault was made upon him because he was an alien? The negro has rights secured to him by the constitutional amendments, and Congress is expressly authorized to enforce them by appropriate legislation.

The CHAIRMAN (Mr. John W. Foster). Gentlemen, I think that while this discussion is very interesting it would be more appropriate after the second regular paper is read and the matter is open for general discussion.

I want to make a few announcements before the next paper is read, especially with regard to the reception this afternoon by the President. The Secretary suggests that it would be more convenient for

the members who expect to attend the reception if they should meet here and go in a body to the White House; it is a very short walk from here and we could go at two o'clock. The tickets can be obtained at the Secretary's office, as has already been explained, as also the tickets for the banquet to-morrow night. The meeting this afternoon will be called at half-past three o'clock, and at half-past four o'clock there is to be a meeting of the General Council. It is a very happy indication of the general interest of the country at large in this Society that we have had so distinguished a person as Senator Turner to come all the way from the Pacific coast to give us this admirable paper which he has read to us this morning. The next paper will be by Mr. Lansing on the same general subject.

ADDRESS OF MR. ROBERT LANSING,
OF WATERTOWN, N. Y.

Mr. Chairman, Ladies, and Gentlemen: It is a year and a half since the San Francisco authorities undertook to segregate the children of Asiatic parents in separate schools, and by doing so involved the United States in a controversy with Japan, whose Government protested against this racial discrimination. Though the feverish utterances of the press of this country as to the imminence of war with Japan were absurd, as Secretary Root pointed out in his address before the American Society of International Law in April, 1907, and though the difficulty was satisfactorily removed through a conference between the interested parties, the event has caused thoughtful Americans to consider the possible results, if the municipal government of San Francisco had refused to modify its policy. For a year the questions to which this hypothesis has directed attention have been the subject of frequent discussion. They involve the fundamental principles of our political system, the proper spheres of Federal and State authority, the constitutional powers and limitations of the National Government, and the international responsibilities of the United States, which are imposed upon its Government as the repository of the treaty-making power.

All these various phases of the subject may be gathered into the

question, What obligation, according to the principles of international law, is there upon the United States to protect domiciled aliens in their rights, whether springing from treaty stipulation or natural justice; and what authority does the Federal Government possess under the Constitution to perform such obligation if one exists? The first half of this question is international in its scope; the second half, national. The first deals with principles that govern the intercourse between nations; the second, with the organic law of the Federal Union.

While it must be admitted that each state of the world is the judge of its own international rights and obligations, and the enunciator of its own code of international law, there are certain principles so fundamental in character and so universally recognized that they may be deemed axiomatic and without modification binding upon every state. Such is the principle that a nation is sovereign and independent, and that the government, the agent of the sovereign of the nation, has authority to demand its rights and to perform its duties in regard to other nations. Whatever may be the restrictions placed upon a government by the sovereign power through the medium of constitutional enactment, these are of no moment to other governments; so far as they are concerned the former, as the representative of the sovereign, is clothed with full powers to fulfill the obligations which natural justice imposes on an independent state. It is, therefore, no valid excuse for failure to perform an international duty to assert that the government's authority is limited by constitutional provisions, for the sovereign's responsibility is not lessened. If sufficient powers have not been delegated to the government, the sovereign is at fault, and other states may justly complain and even compel the delinquent to fulfill its obligations.

The justness of this principle and its necessity to the stability of international order is too apparent to require demonstration. If it did not prevail, any state might by its constitution deprive its government of political powers sufficient to meet the most common obligations due to other governments, thus furnishing its department of foreign affairs with the plea of want of authority in excuse for failure to comply with the just demands made upon it. Clearly no state can,

for its own sake, afford to assume such a position ; nor can it, for the sake of other nations, be permitted to do so.

When, however, this principle, which fixes upon a state international responsibilities, which its government, whatever may be its constitutional limitations, is bound to recognize and to fulfill, is applied to the Government of the United States, there is a confusion of duties and a conflict of authorities. These arise from the American political system, by which there is a division of powers between Federal and State governments. By reason of the fact that at the time of the formation of the Union each State possessed its own criminal code and an organized police it was assumed that the protection of individuals and of private property was a duty of the State governments. It was the expedient course to pursue. Whether the Federal Government possessed the constitutional right to exercise the police power in regard to aliens has never been judicially determined. Following the system instituted at the beginning of our national life Congress has never asserted Federal authority in this sphere of government by the enactment of penal statutes, but has left to the States the care of the life, liberty, and property of individuals, both native and foreign. Under existing conditions, therefore, and in the absence of legislation by Congress, the Federal Government is impotent to compel a proper exercise of the police power in the protection of aliens and in the punishment of crimes against them, and at the same time under the accepted practice of nations it is responsible to other governments for such exercise in regard to their nationals domiciled in the United States.¹

To harmonize the international rule of responsibility and the want of authority in the Government of the United States, under the practice which has prevailed so long, to perform the obligations growing out of such responsibility has been a difficult and vexatious task for American statesmen during the past fifty years. How well

¹ In the *United States v. Hudson*, 7 Cranch, 32, it is held that as there is no common law of crimes in our Federal jurisdictions an indictment will not lie in the absence of a statute for the violation of international law or of a treaty of the United States, notwithstanding that such violation of law or infraction of treaty rights may subject the United States to international reclamations. See also the opinion of Chief Justice Fuller in *Baldwin v. Frank*, 120 U. S., 678.

they have succeeded in their endeavors, and how sound the policy which they have maintained, the review of a few cases will demonstrate.

Before entering upon such a consideration it is necessary to point out that the subject presents two classes of cases. To one of these belong the controversies which have arisen from the failure of foreign governments to protect from wrong American citizens or to punish those who have done the wrong; the other class embraces those cases which have to do with the failure of public authorities in the United States to protect aliens domiciled in this country in the enjoyment of their rights or to punish those who violate them. It is also essential to note that there must at least be negligence on the part of public officials, either police or judicial, so gross in character that it could have been avoided with reasonable care. If normal police protection has been furnished, and justice has been duly administered, no claim will lie against a government for crimes perpetrated against foreign residents by private individuals.

In the class of cases relating to the treatment of American citizens in foreign lands, the doctrine held by the United States Government is laid down in a report made to the Secretary of State in 1885 by Dr. Francis Wharton, then the law officer of the State Department.

"The government," he says, "[of a foreign state] is liable not only for injury done by it, or with its permission, to citizens of the United States, or their property, but for any such injury which by the exercise of reasonable care it could have averted."²

Secretary Fish declared the other proposition which relates to this class of cases:

The rule of the law of nations is that the government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor.³

Bearing these two general propositions in mind, let us turn to some specific cases illustrative of their application.

² *Foreign Relations*, 1885, p. 212.

³ *Moore, International Law Digest*, Vol. VI, p. 655.

In 1894 Mohammedan fanatics destroyed several school buildings at Harput and Marash which belonged to American missionary societies. Mr. Terrell, the minister of the United States at Constantinople, presented the cases to the Ottoman Government and demanded an indemnity on the ground that the police and soldiery had connived at, if they had not actually assisted, the rioters in the work of destruction. The Turkish Minister for Foreign Affairs replied that "the local authorities and imperial troops" had made every effort to protect American lives and property, and therefore his Government was not obligated to indemnify the victims for their losses. He also affirmed that the outbreak was in the nature of an insurrection, and that for wrongs perpetrated by insurgents his Government was not liable. Neither of these reasons, if true, would have been sufficient to relieve the Turkish Government from responsibility.

Secretary Olney, after denying that a mob of religious fanatics constituted an insurrection, and after adducing evidence to show that "the premises of Americans were inadequately guarded" and that the Turkish troops had not interfered with the mob, stated:

The negligence of the authorities and the acts of their agents are here in question, not the deeds of the Kurds, nor still less of the supposed Armenian rebels on whom the Porte seems to seek to throw the responsibility for these burnings and pillagings.⁴

The position thus taken by the United States was maintained and the claims pressed with vigor; and finally in 1900 the Ottoman Government recognized the obligation by paying a lump sum in settlement of these and other demands.

In the correspondence regarding other claims, which grew out of crimes committed in Turkey during this same period of unrest, Secretary Sherman, replying to the declaration of the Porte that it would not admit the principle that it was liable for claims "arising out of the disorders which took place in certain localities of the Empire," replied:

In every case of this kind the Turkish Government either ignores or distorts the abundantly supported contention of this Government

⁴ Foreign Relations, 1895, pp. 1340-1447; *ibid.*, 1896, pp. 880-898.

that the injuries to American property during the recent disorders were suffered through the insufficiency of the protective measures afforded. A government being able to quell and not quelling such disorders, and damage to American property having resulted, the United States contends that Turkey can be held responsible under a well-recognized principle of international law.⁵

There are two points worthy of particular attention in this correspondence: First, the defense of the Turkish Government that it could not be held responsible for the failure of local authorities to suppress lawlessness; and, second, the assertion of the Secretary of State that the ability of a government to protect the persons and property of foreigners and the failure to do so make a government responsible for wrongs perpetrated. The position taken relates to alien rights flowing from the general principle of international law and not to rights secured by treaty, which latter a government has bound itself to respect by specific agreement.

Turning now from a government's neglect to protect American citizens to its neglect to prosecute those who have violated their rights, we will find the United States has been equally insistent in holding the delinquent government responsible for such failure. The following are sufficient to illustrate the doctrine.

In 1894 Frank Lentz, an American citizen, was murdered in Kurdistan. An investigation by some of his friends established the fact that the crime had been committed for the sake of robbery and five or six Kurds and Armenians were arrested and brought to trial. The Turkish court declared, however, that, although the prisoners had murdered Lentz, they had done so "without premeditation." The sentences imposed were short terms of imprisonment, which were never served, as the criminals were permitted to escape. The Department of State, convinced of the willful miscarriage of justice by the Turkish authorities, presented through the American minister a claim against Turkey on behalf of Lentz's parents. To this demand the Porte replied that, as Lentz was traveling alone on a bicycle through a remote and lawless region, Turkey could not be held responsible for his death resulting from so hazardous a journey. To this defense

⁵ Foreign Relations, 1897, p. 592.

Secretary Hay replied that, while appreciating the force of this argument, the liability of the Turkish Government arose from the fact that his murderers had not been duly punished.

The evidence showed [he declared] a deliberate, premeditated murder, yet the judgment was rendered against the murderers as for "murder without premeditation" under the 174th section of the criminal law. And even this penalty was not actually inflicted, for the guilty parties escaped. It is hoped, in view of the enormity of the offense and the miscarriage of justice, that the Turkish Government will pay a reasonable indemnity.⁶

As a result of these representations Turkey recognized its liability and two years later paid a substantial indemnity.

Another illustration of the application of the doctrine that the United States holds a foreign government responsible for a failure to punish those who have committed a crime against an American is the "Renton Case." The facts are as follows: Charles W. Renton in 1888 settled on land granted to him by the Honduran Government. Disputes arose between Renton and the members of a company, which held concessions in the region, that in 1894 culminated in an attack on Renton's plantation, in which his house was burned and he himself taken prisoner. After being held in confinement for a few days he disappeared and was never seen again. There was no doubt but that he was murdered by his enemies. At the instance of Mrs. Renton, who had been expelled from Honduras by the rioters, the United States minister laid the case before the Honduran Government, and upon its failure to act a United States naval vessel was sent to the place where the crime was committed to investigate the affair. The naval commander reported that the Honduran authorities had made practically no effort to apprehend the criminals and that undoubtedly the officials had been corrupted. The United States immediately demanded that the guilty parties be promptly punished, and the Government of Honduras promised to do so.

Seven of the men engaged in the affair were arrested and brought to trial before a jury on the charge of assassinating Renton. The

⁶ Foreign Relations, 1895, pp. 1257-1414; *ibid.*, 1899, p. 766.

verdict was that there was no evidence to prove that Renton was dead, that four of the prisoners were of "irreproachable character," and that three were guilty of wounding Renton in "attempting" to assassinate him. The latter were sentenced to terms of imprisonment and to pay certain sums "for curing" their victim and to "supply food" for him and his family while he was incapacitated by his wounds. The fact that Renton was dead made the sentence absurd. Bribery and intimidation without doubt affected the verdict and sentence. The condemned appealed from the judgment, and on account of the laxity of the authorities all but one had escaped from Honduras before March, 1897. From beginning to end the judicial proceedings were farcical.

In 1904 Secretary Hay reopened the case, demanding pecuniary damages from Honduras. The grounds for this demand he stated thus:

There was an inexcusable delay in initiating a judicial investigation. The first proceedings were partial and one-sided. The subsequent judicial proceedings, which were the direct result of the naval investigation by the U. S. S. *Montgomery*, terminated in condemning for minor offenses persons who, the evidence before the Department shows, were guilty of a deliberate and brutal murder. And finally, soon after the decision of the supreme court, all of the murderers, with the single exception of Dawe, were permitted to escape.

So evident was the miscarriage of justice that the Honduran Government admitted its liability and agreed to pay 78,600 pesos in settlement of the claim.⁷

These cases are sufficient to show the policy of the United States in dealing with foreign governments who have failed to protect American citizens in their rights and to punish those who have violated them. Let us now examine the question from the standpoint of claims preferred against the United States for similar failures of the police and judicial authorities in regard to aliens domiciled in this country.

The first assertion of the policy which has been so generally followed by the United States was advanced by Secretary Webster in

⁷ Moore, *International Law Digest*, Vol. VI, pp. 794-795.

the case of riots against Spanish subjects at New Orleans in 1851. He declared that foreigners "are protected by the same law and the same administration of law as native-born citizens" — that is, by State laws and State authorities. The sufferers were referred by him to the Louisiana tribunals for redress, but public opinion was so strongly in favor of the rioters that no justice could be obtained. Congress ultimately made an appropriation covering the losses which the Spaniards had sustained, but Mr. Underwood, of the Senate Committee on Foreign Relations, was careful to explain that it was "a boon" granted in recognition of the magnanimity of the Queen of Spain in liberating individuals captured during an insurrection in Cuba.⁸ While there is no direct denial of Federal liability, the language of Mr. Webster and the statement of Mr. Underwood are sufficient to indicate the doctrine which was more fully developed by later Secretaries of State.

In 1880 a mob at Denver, Colorado, attacked the Chinese residents of that city, killing one, injuring many, and wantonly destroying a considerable amount of property. The Chinese minister at Washington, in directing the attention of the United States Government to the affair, asked that it should protect the Chinese in Denver and punish the guilty, adding that it would seem just that the owners of the property destroyed should be compensated for their loss. In reply to this request Secretary Evarts said:

As to the arrest and punishment of the guilty persons who composed the mob at Denver, I need only remind you that the powers of direct intervention on the part of this Government are limited by the Constitution of the United States. Under the limitations of that instrument, the Government of the Federal Union can not interfere in regard to the administration or execution of the municipal laws of a State of the Union, except under circumstances expressly provided for in the Constitution. Such instances are confined to the case of a State whose power is found inadequate to the enforcement of its municipal laws and the maintenance of its sovereign authority; and even then the Federal authority can only be brought into operation in the particular State, in response to a formal request from the proper political authority of the State. It will thus be perceived

⁸ House Ex. Doc. Nos. 2 and 113, 32d Cong., 1st sess.; Cong. Globe, vol. 24, part 2, p. 2241.

that so far as the arrest and punishment of the guilty parties may be concerned, it is a matter which, in the present aspect of the case, belongs exclusively to the government and authorities of the State of Colorado.⁹

Mr. Evarts advanced this defense again in the case of Tunstall, an Englishman, who was murdered in New Mexico. In reply to the British minister's claim for indemnity, based on the fact that a deputy sheriff was involved in the murder, Mr. Evarts said:

The laws of the various States and Territories of the Union for the punishment of crimes committed within those several jurisdictions are administered and executed in these several independent jurisdictions by their respective local tribunals and officers free from any control or interference of the Federal Government.¹⁰

In the foregoing cases, however, negligence on the part of the authorities was not proven and they are only referred to in order to show the position taken by the United States, which is so clearly stated by Secretary Evarts. In the riots which took place at Rock Springs, Wyoming, in 1885, in which twenty-eight Chinese were killed, fifteen wounded, and \$150,000 worth of their property destroyed, the Chinese minister, in presenting a claim to the Department of State, charged that the authorities made no attempt to suppress the rioting, that the inquest was described as a "burlesque," and that according to reliable reports none of the offenders was likely to be apprehended and punished.

Secretary Bayard's defense was elaborate and technical. In substance it came to this, that the United States was not liable for losses resulting from lawless acts which the Federal officials had no constitutional power to prevent or to punish, that the local courts were open to the sufferers, who might seek redress there, and that the duty to bring culprits to justice belonged exclusively to the State authorities. Having thus declared the doctrine of his Government as to the limitation of Federal responsibility, Mr. Bayard stated that the President, though he denied "emphatically all liability," would recommend to Congress to grant pecuniary relief to the sufferers,

⁹ Foreign Relations, 1881, p. 319.

¹⁰ Moore, International Law Digest, Vol. VI, p. 663.

"not as under obligation of treaty or principle of international law," but out of "a sentiment of generosity and pity" for the Chinese who were "so shockingly outraged," and because of "the gross and shameful failure of the police authorities of Rock Springs in Wyoming Territory to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law or punish criminals, or make compensation for the loss of property pillaged or destroyed." While thus admitting facts which constituted grounds for a claim as strong as can be found in the annals of international intercourse, the Secretary of State stated that the President would make the recommendation to Congress "with the distinct understanding that no precedent is thereby created."¹¹

When the bill for an appropriation in compliance with the Presi-

¹¹ Foreign Relations, 1886, p. 158.

The doctrine maintained by the United States forced its Government to make some very fine-spun distinctions as to what constituted or did not constitute a ground for claiming national liability for the acts of local authorities. An excellent example of this sort is the case of William Scott Smyth, an American citizen, who in 1874 presented a claim against Brazil for damages arising out of mob violence. The facts were admitted, but the Brazilian Government denied its accountability for them on the ground that the Province where the wrong took place was alone answerable. In meeting this denial Secretary Fish said:

"It is the Imperial Government at Rio Janeiro only which is accountable to this Government for any injury to the person or property of a citizen of the United States committed by the authorities of a Province. It is with that Government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject, who, in this country, might be wronged by the authorities of a State."

Had the Secretary of State stopped here the United States might have been freed from a position which has aroused the criticism of publicists and the complaint of foreign governments. But, following the suggestion of Mr. Webster, he continued:

"There would, however, be this difference. In all our States, the authorities are chosen or appointed by the people or authorities thereof. The United States Government has no part in their election or appointment. In Brazil, however, the governors of the Provinces being appointed by the Imperial Government, the latter may be regarded as specially responsible for their acts in all cases where the law of nations may have been infringed and justice may be unattainable through the courts." (Moore, International Law Digest, Vol. VI, pp. 815-816.)

The weakness of such an argument is apparent; and yet the United States has adhered to a policy which could only find a foundation on such sophistry and on such slender logic as Mr. Fish here employs.

dent's recommendation was debated in Congress, there was by no means unanimity in support of the doctrine of Federal nonliability which had been advanced by Secretary Bayard. Mr. Edmunds, in discussing the question before the Senate, declared as a general principle of international law binding on all states, whatever their system of government, that —

One nation as between itself and another is not bound by the internal anatomy of that state, but it looks to the body of the nation to carry out its obligations, and if they have not the judicial means to do it, for one reason or another, the nation that is injured is not bound by the failure of the nation whose people committed the injury.¹²

The United States, had it been willing to follow the rule thus clearly stated, would have been consistent with its attitude in pressing claims of American citizens domiciled in foreign lands; but we find the Secretary of State, in transmitting to the Chinese minister the moneys voted by Congress, again denying the responsibility of the Federal Government for the negligence of the territorial police and courts.

Six years after the Rock Springs riot New Orleans witnessed a similar outrage, the victims being Italians. The chief of police of that city having been assassinated, popular belief fixed the blame upon the members of a secret society called "La Mafia." Eleven Italians were arrested on suspicion. So high ran public feeling that an armed mob broke into the city prison and shot the prisoners to death. Baron Fava, the Italian minister, at once demanded of the Government at Washington that the guilty parties be "speedily brought to justice." Secretary Blaine telegraphed the governor of Louisiana that the President hoped that the governor would cooperate with him in maintaining the obligation of the United States to Italian subjects and that the offenders would be punished without delay.

The Italian minister, informed of this action, was not satisfied, but demanded a specific assurance from the Federal Government that the rioters would be brought to trial, and that a direct admission would be made by the United States that an indemnity was due to the

¹² Cong. Record, vol. 17, p. 5186.

relatives of the victims. To this demand Mr. Blaine made an adroit answer, which, though it admitted nothing in fact, was of such a character that the Italian Government interpreted it to be a compliance with the demand.¹³ This reply was made in April, 1891. In less than a month the grand jury at New Orleans charged with investigating the crime made its report, in which they failed to indict any person for the lynching.

This failure on the part of the Louisiana authorities to apprehend the perpetrators of a crime committed openly and with no attempt at secrecy placed the Federal Government in a very embarrassing position in view of the interpretation which had been placed on Mr. Blaine's note. President Harrison, in his annual message of 1891, evinced much chagrin at the outcome of the judicial proceedings, and recognized the inconsistency of the position in which it placed the United States. After deploring the lawless act of the New Orleans mob and the failure to punish the persons who shared in it, the President sought to find a solution for the difficulty in which the Central Government was placed by the division of authority between State and nation under the existing practice. To that end he made the following suggestion to Congress:

It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal courts. This has, however, not been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreigner or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights.¹⁴

The force of this logic as to the responsibility of the United States for the acts of local authorities seems irresistible; but as to the power

¹³ *Foreign Relations*, 1891, pp. 665-713.

¹⁴ *Foreign Relations*, 1892, p. xiv.

of Congress to define crimes against treaty rights, a question may be raised as to what rights can be granted by treaty other than those which find their origin in the accepted rules of international law. It involves that fertile subject of discussion, the extent and limitation of the treaty power, which can not here be considered. But as to alien rights established by international law no question can be raised, for the Federal Constitution provides that Congress can legislate for the punishment of offenses against the law of nations.¹⁵

The effect of this declaration by President Harrison as to the responsibility of the United States and the unexercised powers which the Federal Government possessed in regard to domiciled aliens was twofold. First, Secretary Blaine, in delivering to the Italian minister a sum of money for the families of the victims of the New Orleans mob, stated that the President felt that it was "the solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity." Here is no reservation as to the Government's obligation, but an unequivocal admission of liability. Second, a bill was the same session introduced in the Senate which provided that any act committed against the rights secured to an alien by treaty, which constituted a crime under the laws of any State or Territory, should constitute a like crime against the United States and be cognizable in the Federal courts. The bill was reported favorably and debated at some length, but failed to become a law. Thus, the efforts of President Harrison to change the policy of the United States, which had so long invited the complaints of foreign governments and taxed the ingenuity of American statesmen, came to naught.

Other lynchings of Italians occurred during the Administration of President Cleveland, and, after special investigations had been made by the Department of State, the Federal Government paid certain sums for "indemnity," although there was a return to the old practice, for the payments were made without "discussing the liability of the United States for these results [of lawlessness], either by reason of treaty obligations or under the general rules of international law."

Further outrages of a similar nature having taken place during

¹⁵ Constitution, Article I, section 8, clause 10.

the next Administration, President McKinley, in his annual message of 1899, quoted the language of President Harrison and urged legislation along the lines of the bill of 1892.¹⁶ Congress, however, failed to take any action. In his annual message of 1900 the President again renewed "the urgent recommendations" which he had made the year before. The enactment of such a statute, he says, "is a simple measure of previsory justice toward the nations with which we as a sovereign equal make treaties requiring reciprocal observance."¹⁷ Still the President's appeal was without result. Congress evidently hesitated to enact a law which seemed to infringe upon the exclusive criminal jurisdiction of the State courts, and to adopt a course which might be interpreted as a usurpation of authority by the Federal Government.

Seven months after President McKinley's message of 1900, a mob in the State of Mississippi killed several Italians. The ambassador of Italy made complaint in vigorous language, and, after an investigation of the case, Congress in March, 1903, appropriated \$5,000 for the claimants "out of humane consideration, without reference to the question of liability therefor to the Italian Government."¹⁸ Thus, the United States, through the legislative branch of the Government, returned to the doctrine of former years, ignoring the declarations of Presidents Harrison and McKinley. But, considering the fact that no laws had been enacted by which the Federal courts were given jurisdiction of such cases, the position taken by Congress was natural. The fault lay in the failure to legislate as to crimes against aliens rather than in a denial of responsibility therefor.

Thus the question stands to-day. The United States has persistently held foreign governments liable in damages for wrongs done to American citizens when public authorities have willfully or negligently failed to protect them in their rights and to punish persons violating them, whether such rights are based on treaty stipulations or the general rules of international law. On the other hand, up to 1891, the United States has with equal persistency denied responsi-

¹⁶ Foreign Relations, 1899, p. xxii.

¹⁷ *Ibid.*, 1900, p. xxii.

¹⁸ 33 Statutes at Large. p. 1032.

bility and liability for the failure of local officers to perform their duty toward aliens domiciled in the United States on the ground that under the Constitution the Federal Government has no authority over the police and judiciary of a State, and that these were charged with the protection of individuals and the punishment of crimes. After President Harrison's declaration as to the responsibility of the United States for the acts of State authorities, there is a noticeable change, in that the payments made for wrongs to aliens are termed "indemnities" and are not treated as merely charitable donations. And yet the Government has persisted in declaring that such payments must not be regarded as an acknowledgment of liability. In a word, the United States, when not the aggrieved party, clings still to a doctrine out of all harmony with the recognized practice of nations, a practice which it has uniformly required other nations to observe.

It is not the purpose here to discuss the constitutionality of the remedial legislation proposed by President Harrison and urged by President McKinley. That it was proposed by so distinguished a jurist is a strong argument in its favor. On the other hand, the arguments advanced by the opponents of the bill, that the laws against crimes would not, under its provisions, be uniform throughout the Union, but would vary with the penal codes of the different States and Territories, and that to punish acts against foreigners Congress must define the crime and fix the penalty,¹⁹ are not without force in determining the constitutionality of such legislation. That it would, if enacted, give a measure of relief in cases involving criminal acts seems probable, but to what extent it would do so is a question that can be answered only after such a law has been put in operation.

There are, however, many other acts, particularly those of a public character, which are not criminal in their nature, that infringe upon the rights of aliens secured by treaty. A State statute or a municipal ordinance or regulation may be in contravention of such rights. How can these local legislative violations be prevented, so that foreign governments will not have just grounds for complaint? It is apparent that the problem presented is a complex one, and its

¹⁹ Cong. Record, vol. 23, part 5, p. 4551.

solution difficult. But it must ultimately be solved; for, if it is the duty of the Federal Government to protect foreigners in their rights, there must be some constitutional method by which it can perform this duty.

The rights of individuals in a foreign land are far more extensive and definite than they were fifty years ago; and international obligations and liabilities are more fully comprehended and more universally acknowledged than they were then. A nation can no longer live within itself. It can not ignore the generally accepted principles of international law, nor can it afford to defy the opinion of the civilized world by refusing to comply with them. Whatever political institution or political system a nation may possess for the government of its domestic affairs, such institution or system must not interfere with its international duties. No state, however powerful and enlightened it may be, can claim a place among the great nations which is not prepared to do as well as to demand "natural justice" in the broad sense which that term has acquired at the present time. The policy of national selfishness has become antiquated and must give place to those altruistic ideas which are consistent with the modern conception of international morality.

Justice and expediency alike require the United States to abandon a policy which is inconsistent and unreasonable, to recognize fully its responsibility for the proper protection of foreigners within its borders, and to put in operation the necessary forces to compel public officers and local governments, as well as private individuals, to respect the rights which the Federal Government has granted by its treaties to the subjects and citizens of foreign states, and the rights which belong to them under the accepted rules of international law. When that is done, the United States will be free from a policy that has caused its Government much perplexity and embarrassment in the past, and is out of harmony with the modern practice of civilized nations.

The CHAIRMAN (Mr. Foster). Before the subject is opened to general discussion I would like to make one or two announcements. The meeting for this afternoon will be for the discussion of the topic

"How far should loans raised in neutral nations for the use of belligerents be considered a violation of neutrality?" Secretary Straus, one of the Vice-Presidents, will preside at the afternoon session. Professor Reinsch, of the University of Wisconsin, will present the leading paper in the discussion of the subject. The session to-night will be the discussion of a paper presented by General Horace Porter of the Hague Conference. As we all know, General Porter was one of the prominent and influential members of that conference, and the occasion will be an interesting one and will be open to the public. So you will please make it known to your friends that this is a public meeting to-night. Mr. Smith, of Montreal, will also be heard to-night on the subject of arbitration. There will now be a short time for the discussion of the paper just read, but the remarks will be necessarily brief.

Mr. JAMES O. CROSBY, of Garnavillo, Iowa. Mr. President: In the first paper read there was a suggestion made that might be barren of results — that authority should be given the Federal court to investigate the same question. Would not that be in violation of the provision that no person shall be twice put in jeopardy of life and liberty, and would it not be avoided by making the jurisdiction of the Federal court not original but appellate? It seems to me the same objection would not exist.

Mr. EVERETT P. WHEELER, of New York City. Mr. President: The reply to that is this: It has come to pass in our complex system that the laws of the United States punish counterfeiting, and the laws of the States punish the passing of counterfeit money, and it has been held that it is competent for each jurisdiction to prescribe the punishment for those offenses which in effect amount to the same thing, so far as the actual conduct and guilt of the individual are concerned. So in this matter, Congress has under the Constitution power to punish offenses against international law and it has certainly power to enforce by legislation the provisions of treaties. That is not at all inconsistent with a State also undertaking to punish offenses against its own peace. In the one case it is an offense against the State that is punished, and in the other it is an offense against the nation. But

I think we may say that it is rather a theoretical than practical objection, because it is inconceivable that both departments of our great complex government should intervene at once. If the Federal district attorney, for example, should present the matter to a United States grand jury and an indictment should be found, that undoubtedly would take preference. So, in like manner, if the individual be indicted under the State law and should be put on trial in that court, that jurisdiction would take preference. In our admiralty law it has often happened that a sheriff has process against a vessel by attachment under the State law and a United States marshal has process issuing out of the Federal court in admiralty, and yet, by comity, it has been recognized by the courts that whichever jurisdiction first gets possession of the property which is the subject of dispute shall hold and maintain it. There has been no actual conflict except, unless I am mistaken in my recollection, during the heated passions which prevailed before the war on the subject of slavery, and particularly in reference to the fugitive-slave law. There was an instance in Wisconsin where there came an actual conflict between the State and Federal authorities. If my memory serves me, that is the only instance in the history of the country where the conflict has come to the point of actual physical dispute. But that has passed away with the passions which gave rise to it, and it can hardly be imagined that under our present conditions such an actual conflict could arise. But however that may be, the law is that there may be in the same act a violation of Federal obligation and a violation of State obligation. Each jurisdiction has the lawful authority to punish that offense, and the punishment of that offense is not in any respect putting a person in jeopardy twice for the same act, because in the eye of the law it is not the same act. One is an offense against the United States and the other an offense against the State.

Mr. EDMUND F. TRABUE, of Louisville, Ky. Mr. Chairman and Gentlemen: It seems a little strange that we should be, at this date, seriously discussing whether or not we have power, and ought, to enact legislation necessary to carry out our treaty obligations.

Now, the objection urged to the exercise of power seems to be that the rights of the States will be infringed. The best States' rights

men are those who fully recognize the power which is justly due under the Constitution to the Federal Government, and the best nationalists those who fully accord to the States the powers justly belonging to them.

It is true, as suggested by Judge Gray, that a foreigner has no greater rights in any country than a citizen of that country, but we recognize the rights of the Federal Government in the States, and a citizen of one State is not dependent upon the local judiciary of another State, perhaps prejudiced and partial in controversies between him and local citizens, but is entitled to resort to the Federal courts.

Again, the Federal Government has the right of self-protection in the States, and did not rely upon California to protect Justice Field from the deadly weapon of an ex-justice of its highest court, but assigned him Federal protection, and its act was upheld in *Ex parte Nagel*.

When treaties and the Federal Constitution and statutes are the supreme law of the land, the Federal Government is not dependent upon the caprice of the States for enforcement of its treaties, and if it were it would be timid indeed in making treaties, and the States emboldened in capriciously disregarding them. It is not depreciating the States to recognize the just powers of the Federal Government, and it would humiliate the Government to have to rely upon the States to fulfill its treaties. Recompensing foreigners for injuries to person and property, coupled with the protestation that the act is one of bounty or generosity and not of duty, confesses the duty and concedes its nonfulfillment.

Mr. FREDERIC R. COUDERT, of New York City. Mr. Chairman: The approach of the lunch hour, the heat of this spring day, as well as your firm but tender warning, are more than sufficient to prevent my launching upon anything that may be construed into a prolonged discussion or rise to the dignity of anything more than a passing, but I trust not wholly irrelevant, interruption of the course of this learned and orderly debate.

None of the learned gentlemen who have advocated the right of Congress to pass legislation necessary to enforce treaties have con-

vinced me that they were wrong. I am still, as I was before I had the pleasure of hearing them, entirely in agreement with their view that the United States Government has full and plenary power to carry out all the obligations which it may properly subject itself to by its treaties. Upon hearing so much interesting discussion upon what seemed to me so fundamental a point, I could not help being reminded of the old-fashioned and religious gentleman who, stopping at a bookstall, picked up a volume which purported to prove the existence of God. As he looked at the title, he remarked: "As though anybody would have been fool enough to doubt it, if some wise man had not written a book to prove it."

If the learned Chairman please, it has just occurred to me to refer to an example of how a treaty stipulation may be and actually is enforced.

Some time ago, the Russian consul-general in New York informed me that the local court of Massachusetts had refused to allow the Russian vice-consul to take out letters of administration upon the estate of a Russian national dying intestate in Massachusetts. The amount left by the Russian was insignificant but not so insignificant as to escape the eye of the public administrator, who claimed that under the Massachusetts code it was his right to administer all the estates of decedents leaving no resident or citizen heirs competent to take out letters. The Russian vice-consul, alive to the dignity of his office, consulted counsel, as to whose competency modesty forbids me to speak, and he was advised that under the most-favored-nation clause of the treaty he had the right to claim appointment as administrator, and that in that respect the local laws of Massachusetts were superseded by the treaty.

This contention was based upon the fact that in some of the treaties with the Latin-American states there is a clause permitting the consuls of each nation to administer in the case of one of their nationals dying intestate and with no citizen relatives competent to administer under the local law.

When this suggestion was made to the probate court in Massachusetts, it was somewhat contemptuously dismissed with the suggestion that no mere treaty could supersede the procedural dispositions of the

law of the Commonwealth of Massachusetts, especially in view of the fact that no United States statute sanctioning the treaty clause in question could be found.

After this rebuff, nothing was left but to appeal to the Supreme Court of Massachusetts, and that court, after respectfully listening to extended argument upon the whole subject, delivered a characteristically learned and I believe sound opinion to the effect that the treaty clause was part of the "law of the land," including Massachusetts itself, and that it *pro tanto* superseded and overrode those otherwise obligatory dispositions permitting the public administrator to take into his hands all property so situated.

The right of the consul was thus held superior to that of the public administrator and the treaty clause part of the law of Massachusetts, although no Federal legislation other than the treaty itself existed on the subject.

As the amount was very small and the matter of little practical importance, the case attracted no attention. The consul did not attempt to advertise it and it did not come into public notice, except that the decision was published by my learned friend the editor of the INTERNATIONAL LAW JOURNAL, from whose scrutinizing vigilance nothing bearing upon international law can possibly escape.

Does it not seem almost ludicrous that matters so comparatively insignificant as the administration of the small estates of alien immigrants can be placed by treaty stipulations under the solemn protection of the Federal Government, and yet guaranties of life, liberty, and security given to foreigners under treaties may be set at naught in the Commonwealth of the Union? (Wymans, Petitioner, 191 Mass., 276.)

It seems to me unsound and scarcely plausible to argue that the enforcement of such treaty stipulations can interfere with the law of the States. All the States have laws which provide for the security of life and property. It is not a new law that is needed, but a better enforcement of existing law. The Federal tribunals, in carrying out such treaty stipulation, would consequently be merely enforcing the local law, just as they do to-day in cases arising between citizens of the various States.

There is, therefore, nothing new or revolutionary in the suggestion

of transferring to the Federal court certain criminal cases arising between foreigners and persons in the States. The State's sovereignty is no more detracted from than in the every-day case of trying the question of whether a citizen of New Jersey, injured by a New York trolley line, should have redress.

If one prefers to sue in the Federal court, it has been frequently held that the motive dictating such action is not a matter that will be inquired into. If the machinery of the State courts is not always adequate to protect foreigners in those fundamental rights which are guaranteed to all men by the Constitution, why should the State complain if the United States chooses to make a treaty guaranteeing those very same rights and allowing those guaranties to be enforced in the Federal courts?

The matter seems to be one wholly of the detail of the procedure rather than one involving any large question of policy or constitutional law.

Mr. GEORGE TURNER. Mr. Chairman: When I was preparing my paper and had approached that part of it relating to the character of penal legislation which I thought might be adopted eventually, I endeavored to reduce to concrete form some of the abstractions that I was talking about, and I reviewed two forms of statutes, according to the alternative suggestions expressed by me, in order to see if I could reduce to concrete what I had suggested. I have that in my hands now, and as it bears somewhat upon the discussion that has been had here, I will ask, if consistent with the rules of the Society, that it be published along with my former statement.

The CHAIRMAN (Mr. Foster). That will be done, without objection.

[There was no objection.] ²⁰

The CHAIRMAN (Mr. Foster). There are many of us here who have borne the heat and burden of the day on these questions, and it is a pleasure to know that the young men are coming forward. It is gratifying to me to hear Mr. Coudert, who represents a worthy name for very distinguished service in the practice of international law, speak to us this morning. There are a few minutes now before we

²⁰ See p. 34, *supra*.

take our midday adjournment. Is there anyone else who desires to be heard?

MR. LAWRENCE EVANS, of Tufts College, Mass. MR. CHAIRMAN: I would like to add just one word to this discussion. In almost every case where the rights of a foreigner are invaded in this country the one form of redress which the government of the injured national demands is the one form which this Government can not afford — that is, the guaranty that the offender will be sought out and punished. It is an easy thing for the Government of the United States to pay an indemnity, and particularly easy for it to do so when it is at the same time disclaiming all obligation to do so, but in a large proportion of the cases the one thing which the government of the injured national demands above everything else is the detection and punishment of the offender. Of course our Government could not under any circumstances guarantee the conviction and punishment of the guilty parties; but if the suggested change in the law were made the Government could guarantee that it would use its utmost efforts to obtain such conviction and punishment by a prosecution conducted by its own officers in its own courts. Now, we know, in the case of the Italians who were lynched at New Orleans in 1891, in what a humiliating position the Department of State of the United States was placed when it was obliged to confess to the Government of Italy that the prosecution and punishment of the offenders rested altogether with the State of Louisiana. We also know how that feeling of humiliation must have grown in view of the failure of the State of Louisiana to make any adequate attempt to ascertain who the offenders were. There, it seems to me, is the chief reason for the enactment of legislation which will extend Federal jurisdiction to offenses of this kind, in order that our Government may be relieved from this very embarrassing position which it is forced now to occupy when we must confess to every foreign government that if their citizens are injured here we can not undertake to seek out the guilty parties and prosecute them in the Federal courts.

THE CHAIRMAN (MR. FOSTER). The hour has arrived for the adjournment of the morning session.

Our meeting this afternoon will be at half-past three o'clock, but members who are to be received by the President should be here at two o'clock and go to the White House in a body.

[At this point the meeting took a recess until 3.30 o'clock p. m.]

RECEPTION BY THE PRESIDENT OF THE UNITED STATES

Friday, April 24, 1908

At half-past 2 in the afternoon the President of the United States, attended by Hon. Elihu Root, Secretary of State, and Hon. William H. Taft, Secretary of War, received the members of the American Society of International Law in the East Room of the White House.